

THE HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,
Plaintiff,
vs.
MOTOROLA, INC., et al.,
Defendants.
MOTOROLA MOBILITY LLC, et al.,
Plaintiffs,
vs.
MICROSOFT CORPORATION,
Defendants.

Case No. C10-1823-JLR

**MICROSOFT'S RESPONSE TO
RESEARCH IN MOTION'S MOTION
TO SEAL TERMS OF PATENT
LICENSE AGREEMENTS AND TO
DENY MICROSOFT IN-HOUSE
COUNSEL ACCESS TO THE
AGREEMENTS**

NOTED: November 9, 2012

I. INTRODUCTION

Non-parties Research in Motion Limited and Research in Motion Corporation
(collectively "RIM") have moved to seal in their entirety two license agreements between RIM
and Motorola¹, as well as alter the Amended Protective Order Regarding the Disclosure and

¹ These licenses, which are identified on page 4 of RIM's motion, are referred to herein as the "Motorola-RIM License Agreements."

1 Use of Discovery Materials (the “Amended Protective Order”²) to preclude Microsoft’s in-
 2 house counsel, T. Andrew Culbert from either (a) having access to the Motorola-RIM License
 3 Agreements, or (b) engaging in future negotiations between Microsoft and RIM.

4 Microsoft does not oppose the sealing of those portions of the Motorola-RIM License
 5 Agreements that disclose the royalty rates, payment terms, or any other financial information
 6 that might constitute trade secrets of either Motorola or RIM. However, Microsoft believes
 7 that, consistent with the position it took in its Motion to Seal Trial Exhibits that Disclose
 8 Microsoft’s Trade Secrets (ECF No. 510) and Judge Koh’s recent sealing order in *Apple, Inc.*
 9 *v. Samsung Electronics Co., Ltd.*, No. 11-CV-1846, 2012 WL 3283478 (N.D. Cal. Aug. 9,
 10 2012), only this confidential financial information should be sealed. RIM has not
 11 demonstrated that compelling reasons exist to seal the remaining non-financial terms of the
 12 Motorola-RIM License Agreements.

13 RIM’s request that Culbert be precluded from having access to the Motorola-RIM
 14 License Agreements should also be denied. The Court has already specifically amended the
 15 original protective order in this case to allow Culbert the precise access that RIM now requests
 16 be withdrawn. Since the Court’s October 3, 2012 order entering the Amended Protective
 17 Order, Culbert has had access to expert reports and other documents referencing the terms of
 18 Motorola’s licenses with third parties such as RIM. To take this right of access away from
 19 Culbert would unfairly prejudice Microsoft in its ability to litigate this case. Motorola’s entire
 20 RAND royalty argument is based on the alleged comparability of its licenses with third parties
 21 such as RIM. Culbert reasonably requires access to this information in order to fulfill his
 22 responsibilities of overseeing the trial management and litigation of these issues. Further, as
 23 Culbert has been ordered by the Court to sign every Microsoft filing, he has obligations under
 24

25 ² ECF Nos. 434-1; 447.

1 Fed. R. Civ. P. 11 that can be satisfied only with access to the evidence underpinning the
2 submissions he sponsors.

3 Finally, the Amended Protective Order precludes Culbert from “revealing ...
4 Confidential Business Information to anyone” at Microsoft, and specifically restricts him to
5 using “such Confidential business Information solely for the purposes of this action.”
6 Amended Protective Order, ¶4(ii)-(iii). In light of Culbert’s commitment to adhere to these
7 terms, RIM has not shown there exists an unacceptable risk that Culbert will disclose the terms
8 of the Motorola-RIM License Agreements in a manner that will harm RIM.

9 RIM also has not established good cause for effectively rescinding the Amended
10 Protective Order and reinstating the original Protective Order. RIM makes the same arguments
11 the Court rejected in granting Microsoft’s Motion to Amend the Protective Order. There is no
12 reason for the Court to now reconsider its earlier ruling. RIM’s motion to amend should be
13 denied.³

14 II. FACTS AND ARGUMENT

15 A. Compelling Reasons Exist to Redact the Royalty and Pricing Terms from the 16 RIM-Motorola Licenses, But Not to Seal Them Entirely.

- 17 1. RIM Has Not Met Its Burden of Showing that Its Licenses Should be Sealed in
18 Their Entirety; Redacting the Financial Terms of the Licenses Suffices to
Balance the Parties’ and the Public’s Interests.

19 It is well-settled in this Circuit that judicial records cannot be sealed at trial unless the
20 moving party presents “compelling reasons” that outweigh the public policy in favor of the
21 public’s access to judicial records. *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172,

22 _____
23 ³ In its Motion, RIM states that its counsel conferred with counsel for Microsoft prior to filing its motion and that
24 “[c]ounsel for Microsoft stated that Microsoft has no position on the motion.” Motion at 3. To be clear, counsel
25 for Microsoft did not state that “Microsoft has no position on the motion” during the call. Microsoft’s stated
position on the call was that it could not commit to a position without having reviewed RIM’s motion, and that it
would respond once it had an opportunity to consider the details of RIM’s argument. Having now had such an
opportunity, Microsoft’s response is set forth herein.

1 1178-79 (9th Cir. 2006); LCR 5(g)(3) (with respect to documents submitted at trial or in
 2 connection with dispositive motions, “[t]here is a strong presumption of public access to the
 3 court’s files [that] may be overcome only on a compelling showing that the public’s right of
 4 access is outweighed by the interests of the public and the parties in protecting the court’s files
 5 from public review”). In *Apple*, 2012 WL 3283478, at *1, Apple, Samsung, and various third
 6 parties (including RIM, Microsoft, and Motorola) moved to seal certain terms of various
 7 license agreements that the parties anticipated relying on at trial.

8 After considering the parties’ motions, the court held that “pricing terms, royalty rates,
 9 and guaranteed minimum payment terms’ plainly fall within the definitions of ‘trade secrets’
 10 for purposes of sealing motions.” *Id.*, at *10, citing *In re Elec. Arts*, 298 Fed. Appx. 568, 569
 11 (9th Cir. 2008). The court went on to hold that while information related to pricing terms,
 12 royalty rates, and payments was trade secret information, “all other licensing information,
 13 however, will not be sealed.” *Id.*, at *6, *10. This included information such as the names of
 14 the license parties, the license term, products covered, the scope of the license, and whether
 15 each license included a cross license. *Id.*

16 The approach taken by Judge Koh in *Apple*, permitting redaction only of the financial
 17 terms of the licenses that the parties’ may introduce or rely on at trial, is also appropriate here.
 18 RIM has not established how any of the non-financial terms of the Motorola-RIM License
 19 Agreements constitute trade secret information that must be sealed, or how RIM would be
 20 harmed if these other provisions were not sealed.⁴ For these reasons, RIM’s motion to seal
 21 should be granted only with respect to the financial terms of the Motorola-RIM License
 22 Agreements and denied in all other respects.

23
 24 ⁴ To the extent that RIM believes that specific additional terms or provisions of the Motorola-RIM License
 25 Agreements should be maintained under seal, RIM should provide proposed redactions for the Court and parties
 to consider.

2. There Is No Basis to Close the Courtroom.

RIM also seeks an order from the Court closing the courtroom when the terms of the RIM-Motorola License Agreements are discussed. However, there is no need to go to these lengths. RIM has not established that “compelling reasons” exist that would justify closing the courtroom. *See Kamakana*, 447 F.3d at 1179 (explaining the heightened “compelling reasons” standard for withholding access to materials used at trial). Further, before closing the courtroom, the Court must determine that no reasonable alternatives to closure exist that would sufficiently protect RIM’s interests. *See Publiker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1072 (3rd Cir. 1984) (court should weigh possible alternatives before closing courtroom).

While Microsoft does not contest that the financial terms of the Motorola-RIM license should be maintained in confidence, this alone does not necessitate closing the courtroom when other reasonable alternative protective measures are available. Both parties understand the sensitivity of the financial terms of the parties’ confidential third-party licenses, as both parties have sought to seal those portions of the license agreements. Neither party intends to disclose the financial terms of those licenses at trial. The most efficient way to handle this confidential licensing information at trial is for the Court to instruct the attorneys, witnesses, and experts that they are not to audibly disclose any royalty or pricing terms at trial. Instead, the witnesses and attorneys should be instructed to refer to the financial terms only by reference to exhibits on which the terms appear – exhibits which will not be visible to the public.

Closing the courtroom is also impractical given the amount of testimony that will be devoted to discussing Motorola’s licenses with third parties (including RIM). Multiple witnesses will be examined regarding the comparability (or noncomparability) of the licenses. Repeatedly opening and closing the courtroom during these examinations is likely to be distracting and time-consuming. It would be much more efficient for the Court and counsel to

1 instruct witnesses not to explicitly disclose the financial terms of the licenses. RIM's motion
2 to close the courtroom should be denied.

3 **B. The Court Should Not Rescind the Amended Protective Order and Reinstate the**
4 **Original Protective Order.**

5 1. Factual Background.

6 Microsoft and Motorola submitted a Stipulated Protective Order to the Court on April
7 19, 2011, which the Court approved by order dated July 21, 2011.⁵

8 By order dated January 24, 2012, the Court required that the parties each designate one
9 in-house attorney to sign every substantive filing by the parties. Microsoft designated Culbert,
10 and Motorola designated one of its in-house attorneys, as the signatories. By signing pleadings
11 and motion papers, Culbert and his counterpart at Motorola assumed the responsibilities set
12 forth in Fed. R. Civ. P. 11 regarding the evidentiary support for contentions made in the
13 parties' respective submissions. Recognizing that both parties' designees required access to
14 the relevant evidence underpinning each submission that they sign, and because Microsoft's in-
15 house counsel should be entitled to the same right of access as Motorola's in-house counsel
16 with respect to key evidence in this case, Microsoft moved on August 30, 2012 for leave to
17 amend the Stipulated Protective Order in place in this action. Motorola opposed Microsoft's
18 motion, arguing that good cause did not exist for the amendment. The Court rejected
19 Motorola's arguments, and granted Microsoft's Motion to Amend on October 03, 2012.⁶

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24 ⁵ ECF Nos. 64; 72.

25 ⁶ ECF No. 447.

2. RIM Has Not Established Good Cause for Rescinding the New Provisions of the Amended Protective Order or Otherwise Shown that Culbert Should Be Prohibited from Having Access to the Terms of the Motorola-RIM License Agreements.

In its Motion, RIM makes the same arguments previously made by Motorola and rejected by the Court. Having raised neither new nor compelling arguments, RIM has failed to establish good cause for the Court to reconsider its earlier ruling.

In *ODS Tech., L.P. v. Magna Entertainment Corp.*, 583 F. Supp. 2d 1141 (N.D. Cal. 2008), the court found that:

In granting a protective order that excludes counsel or others from access to confidential information, the sole question is whether there is an unacceptable risk of or opportunity for the disclosure of confidential information. Such risk exists when counsel are involved in “competitive decisionmaking,” which is “shorthand for counsel’s activities, association, and relationship with a client that are such as to involve counsel’s advice and participation in any or all of the client’s decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor. “Thus, the factual circumstances surrounding each individual counsel’s activities, association, and relationship with a party, whether counsel be in-house or retained, must govern any concern for inadvertent or accidental disclosure [of confidential information.]”

Id., at 1144 (internal citations omitted). *See also Carpenter Technology Corp. v. Armco, Inc.*, 132 F.R.D. 24, 27-28 (E.D. Pa. 1990) (allowing in-house counsel without competitive decision-making responsibilities access to defendant’s confidential information); *Gerawan Farming, Inc. v. Prima Bella Produce, Inc.*, 2011 WL 2516224, *2 (E.D.Cal. June 22, 2011) (citing cases).

The Court already determined, in granting Microsoft’s Motion to Amend the Protective Order, that Culbert is not involved in “competitive decisionmaking.” *See* October 3, 2012 Order (ECF No. 447); Reply re Motion to Amend Protective Order (ECF No. 437).⁷ As

⁷ For this reason, the cases RIM cites in support of its motion to amend the protective order are inapposite. The court’s ruling in each turned on a detailed, factual determination that the in-house counsel at issue had a “competitive decisionmaking” role. Here, as the Court has previously found in amending the protective order, Culbert is not in such a role at Microsoft. RIM has not offered any evidence to the contrary. *See ActiveVideo Networks, Inc. v. Verizon Communs., Inc.*, 274 F.R.D. 576, 582-83 (E.D. Va. 2010) (conclusory allegations of involvement in licensing negotiations or settlement of litigation is not enough to establish “competitive

1 Microsoft explained in connection with its motion, and as Culbert confirms in his declaration
 2 accompanying this response, Culbert does not serve any executive or non-legal functions at
 3 Microsoft relating to product design, development, pricing, marketing or sales. Culbert Decl.,
 4 ¶¶ 2; 6.⁸ He does not engage in patent prosecution as part of his regular employment
 5 obligations. *Id.*, ¶ 7. He is not a member of Microsoft's licensing department; any licensing
 6 activity in which he engages occurs only in connection with the settlement of active litigation.
 7 *Id.*, ¶ 2. Microsoft is a large company with tens of thousands of employees and hundreds of in-
 8 house counsel. In this environment, disclosure of Motorola's licensing agreements and related
 9 materials to in-house counsel like Culbert – whose responsibilities relate primarily to oversight
 10 of numerous ongoing patent litigation activities (which includes advising management in
 11 connection with risk exposure and possible settlement opportunities) and provision of legal
 12 advice relating to IP policy implementation – does not create an undue risk of competitive
 13 harm.⁹

14 The fact that Culbert has signed the Protective Order subscription in this matter also
 15 minimizes any possible risk of competitive harm. Culbert Decl., Ex. A. By signing the
 16 Protective Order, Culbert agreed:

17 that any Confidential Business Information and any copies, excerpts, or
 18 summaries thereof, as well as any knowledge or information derived from any of
 19 the aforementioned items, may be used solely for purposes of this litigation and
 20 may not be used for any other purpose, including without limitation, and business,
 commercial or academic purpose.

21 decisionmaking;" the moving party must set forth facts demonstrating how involvement in patent licensing
 22 activity or settlement negotiations amount to competitive decision-making).

23 ⁸ Declaration of T. Andrew Culbert in Support of Microsoft's Response To Research In Motion's Motion To Seal
 Terms Of Patent License Agreements And To Deny Microsoft In-House Counsel Access To The Agreements
 ("Culbert Decl.").

24 ⁹ The Court granted Microsoft's Motion on October 3, 2012. Since that time, and in accordance with the
 25 Amended Protective Order, Culbert has been provided unredacted copies of the parties' expert reports and other
 documents that refer to or describe the terms of Motorola's licenses with third parties, including RIM.

1 Contrary to RIM's unsupported allegations (Motion at 9-10), the Protective Order specifically
 2 restricts Culbert from using information learned in connection with reviewing materials
 3 designated as containing confidential business information in connection with any purpose
 4 other than this litigation. There is no reason to doubt that Culbert – an attorney – will comply
 5 with the restrictions on use and disclosure already imposed by an order of this Court.

6 Further, Microsoft's ability to try this case will be prejudiced if Culbert is not permitted
 7 access to the terms of Motorola's third-party licenses such as the Motorola-RIM License
 8 Agreements. The primary issue to be determined at the November trial is the appropriate
 9 RAND royalty for a license to Motorola's 802.11 and H.264 standard essential patents.
 10 Motorola's proposed RAND royalty is based, in large part, on licenses Motorola has entered
 11 into with third parties (such as RIM) that Motorola argues are "comparable." It would be
 12 unfairly prejudicial to Microsoft for Motorola to put on its case relying on purportedly
 13 "comparable" licenses, if Culbert were prohibited from seeing Motorola's supporting evidence
 14 of comparability.

15 In an analogous situation, the court in *Barnes and Noble v. LSI*, No. 11-cv-2709, 2012
 16 U.S. Dist. LEXIS 23103 (N.D. Cal. Feb. 23, 2012), found that in-house counsel for Barnes &
 17 Noble could not be precluded from viewing LSI's licensing agreements because "both parties
 18 need to have access to the relevant financial data for an accurate and efficient outcome to be
 19 reached." *Id.*, at *17 n.7. Important to the court's decision was the fact that "the details of
 20 [Defendants'] licensing practices are essential to determining the scope of potential damages."
 21 *Id.*, at *16-17. "It is with these license agreements that a reasonable royalty rate, and hence
 22 Defendants' potential damages, will be determined." *Id.*, at *17.¹⁰ Motorola, too, intends to

23 _____
 24 ¹⁰ The court also noted that "several courts have recognized that disclosure of sensitive financial information to an
 25 opponent's in-house counsel may be necessary for evaluating settlement" and that "given that Defendants seek
 damages against B&N for patent infringement, the sensitive financial information that will be needed for
 settlement purposes necessarily includes Defendants' license agreements." *Id.*, at *17-18.

1 rely on its third party licenses with companies such as RIM as the basis for determining a
 2 RAND royalty. While Microsoft disagrees that these licenses are comparable, it is imperative
 3 that Culbert have access to this evidence in order to perform his responsibilities as in-house
 4 litigation counsel.¹¹ Courts regularly recognize that the need to understand the extent of
 5 potential damages at issue in a case justifies the disclosure of confidential business information
 6 to in-house counsel. *See, e.g., Gerawan*, 2011 WL 2516224, at *2.

7 Finally, as Microsoft articulated in its Motion to Amend, Culbert – as an attorney who
 8 has been required to sign all of Microsoft’s pleadings, motions, and other court submissions –
 9 is obligated to comply with the requirements of Fed. R. Civ. P. 11. In order to do so, Culbert
 10 must have access to all evidence supporting (or contradicting) the submissions to the Court that
 11 he has signed.¹² Motorola’s Motion to Amend the Protective Order should be denied.

12 3. RIM Has Not Met Its Burden of Establishing Good Cause to Amend the
 13 Protective Order to Preclude Culbert from Negotiating with RIM in the Future.

14 RIM argues in the alternative that this Court should amend the protective order to
 15 preclude Culbert from engaging in future negotiations with RIM. RIM has not supported this
 16 request with any actual evidence that Culbert regularly participates in licensing negotiations or
 17 provided any reason to suspect that Culbert would violate the Amended Protective Order
 18 already in place in this action by using knowledge of the terms of the RIM license for an
 19 improper purpose. Culbert has confirmed in his declaration that he does not engage in

20 ¹¹ If the Court grants RIM’s motion to amend the protective order to preclude Culbert from having access to the
 21 Protective Order, Motorola should be precluded from relying on the RIM-Motorola License Agreements to
 22 determine the appropriate RAND royalty at trial. It would unfairly prejudice Microsoft if Motorola were able to
 23 rely on undisclosed evidence that Motorola claims is highly relevant to the issue of comparability, that
 24 Microsoft’s attorneys were precluded from reviewing. *See Barnes & Noble*, 2012 U.S. Dist. LEXIS 23103, at *17
 25 n.7.

¹² Under Rule 11, by signing pleadings, motions, and other court submissions, attorneys make certain
 representations, including that “the factual contentions have evidentiary support or, if specifically so identified,
 will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.” Culbert
 reasonably cannot make such a representation if he is not allowed to have access to the underlying evidence in the
 case.

1 competitive decision-making. *ODS*, 583 F. Supp. 2d at 1145; *see also Volvo Penta of the*
 2 *Americas, Inc. v. Brunswick Corp.*, 187 F.R.D. 240, 245 (E.D. Va. 1999) (“the Court cannot
 3 overlook the unrebutted and sworn assertions that [in-house counsel] has no role whatsoever in
 4 [the company’s] competitive decisionmaking”). RIM has not met its burden for amending the
 5 protective order.

6 RIM’s argument is based on pure speculation. The declaration of Michael Crowley that
 7 RIM submitted in support of its motion merely speculates in conclusory fashion that Culbert
 8 could potentially participate in licensing negotiations involving RIM and could potentially use
 9 his knowledge of the Motorola-RIM License Agreements to RIM’s detriment. But RIM has
 10 set forth no facts that would indicate how knowledge of the terms of a cross-license between
 11 Motorola and RIM covering certain specific patents and technologies would be relevant to
 12 future hypothetical license negotiations between Microsoft and RIM over entirely different
 13 patents, covering entirely different products and technologies. RIM’s argument also
 14 completely ignores Culbert’s sworn declaration and the express language of the Amended
 15 Protective Order, which provides that Culbert cannot “reveal such Confidential Business
 16 Information” to anyone at Microsoft, and that he will “utilize such Confidential Business
 17 Information solely for purposes of this action.” Amended Protective Order at ¶4(ii)-(iii).¹³

18 In the absence of any such evidence that there is an “unacceptably” high risk that
 19 Culbert is likely to disclose confidential information in violation of the existing protective
 20 order, RIM cannot establish good cause for further amendment of the Amended Protective
 21

22 ¹³ If the Court were inclined to grant RIM’s motion to amend the Amended Protective Order to bar Culbert from
 23 participating in negotiations with RIM, such an amendment should be narrowly tailored in both time and scope to
 24 include only those negotiations that involve the specific patents and products covered by the Motorola-RIM
 25 License Agreements. Any such bar should also exclude any settlement negotiations that might arise between
 Microsoft and RIM in connection with some future litigation between the parties. If the Motorola-RIM License
 Agreements are relevant to that future hypothetical litigation, Culbert’s access to the Motorola-RIM License
 Agreements should be determined at that time. An order by this Court precluding Culbert from participating in
 any such negotiations would be premature and unwarranted.

Order. *See Nazomi v. ARM Holdings PLC*, No. 02-02521, 2002 U.S. Dist. LEXIS 21400, *10-11 (N.D. Cal. Oct. 11, 2002) (refusing to impose on counsel a “license negotiation bar” unless the party seeking such a bar “makes a showing that the risk of inadvertent disclosure from attorney to client is so great that an access bar must be imposed”); *see also ODS Tech.*, 583 F. Supp. 2d at 1144-45 (burden is on moving party to establish that “unacceptable risk of or opportunity for the inadvertent disclosure of confidential information” exists). Because no such evidence exists, RIM’s motion should be denied.

III. CONCLUSION

For the reasons set forth herein, Microsoft requests that the Court enter an order:

1. Denying RIM’s Motion to Seal the Motorola-RIM License Agreements except as to the pricing, royalty, or other financial terms contained therein; and
2. Denying RIM’s Motion to Amend the Amended Protective Order currently in place in this action.

DATED this 7th day of November, 2012.

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CERTIFICATE OF SERVICE

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 7th day of November, 2012, I caused the preceding document to be served on counsel of record in the following manner:

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10 DATED this 7th day of November, 2012.
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s/ Linda Bledsoe
LINDA BLEDSOE